IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JODHPUR
::::

**ORDER**

**M/S. RANWA CONSTRUCTION COMPANY**
**VS**
**THE ADMINISTRATOR, PANT KRISHI BHAWAN, JAIPUR & ANR**

**S.B. CIVIL REVISION PETITION NO.233/2004 AGAINST THE ORDER DATED 16.4.2004 PASED BY THE DISTRICT JUDGE, SRI GANGANAGAR IN CIVIL SUIT NO.85/2003.**

**DATE OF ORDER** : 3.8.2005

**REPORTABLE**

**PRESENT**
**HON'BLE MR. PRAKASH TATIA,J.**

Mr.JK Bhaiya ]
Mr. KR Saran ], for the petitioner.
Mr.SG, Ojha, for the respondents.

<><><>

**BY THE COURT:**

Heard learned counsel for the parties.

This revision petition is against the order dated 16.4.2004 passed by the learned District Judge, Sri Ganganagar on the application filed by the defendants-respondents under Section 8 of the Arbitration and Conciliation Act, 1999 (hereinafter referred as 'the Act of 1996). The learned District Judge, Sri Ganganagar by the impugned order referred

the matter to the arbitrator under Section 8 of the Act of 1996.

According to learned counsel for the petitioner, the court below has committed serious error of law in entertaining the application under Section 8 of the Act of 1996 because of the fact that neither the original arbitration agreement nor its certified copy was produced by the defendants alongwith the application or even thereafter. And as per the mandatory provision of sub-section (2) of Section 8 of the Act of 1996, no application under Section 8 of the Act of 1996 can be entertained unless original copy of the arbitration agreement or its certified copy is produced alongwith the application. It is also submitted by learned counsel for the petitioner that the court is required to examine the validity of the arbitration clause and when the arbitration agreement was not produced then the court had no occasion to apply its mind to the terms and conditions of the clause of arbitration and, therefore, the court below had no occasion to examine whether the dispute can be referred to the arbitrator or not. It is also submitted that petitioner has also raised objection in writing before the trial court that arbitration agreement was not filed by the defendants before the court.

Apart from above, on merit, it has been submitted that the arbitration clause contains provision for having four arbitrators and as

per Section 10 of the Act of 1996 there can be arbitrators only in un even number. Learned counsel for the petitioner relied upon the Division Bench Judgment of the Allahabad High Court delivered in the case of Jamuna Das Rameshwar Das & anr. Vs. Allahabad Bank & Ors. reported in 1986 (1) Arb. L.R. 48 wherein the Division Bench of Allahabad High Court held under the Arbitration Act, 1940 (Old Act) that the court below was right in refusing to stay the suit proceedings as the arbitration agreement had not been established. Learned counsel for the petitioner further relied upon the judgment of the Hon'ble Apex Court delivered in the case of ITC Ltd. Vs. George Joseph Fernandes & Anr. Reported in 1989 (2) Arb.LR 49 wherein the Hon'ble Apex Court held that where there is no valid arbitration agreement on the subject matter of the suit, there is no jurisdiction for staying the suit. The Hon'ble Apex Court in the above case of ITC ltd (supra) also observed that where the plaintiff alleges that contract containing arbitration clause is void and illegal and prima facie it appears that there are sufficient ground on which the legality of the said contract has been challenged for non-compliance of the statutory requirement, the court should decline to exercise discretion in favour of the stay of the suit.

I considered the submissions of learned counsel for the petitioner and perused the judgments relied upon by learned counsel for the petitioner. It appears from the facts of the case that plaintiff filed the

suit by specifically admitting that there is an arbitration agreement between the parties. The plaintiff in his plaint very clearly stated that though there is an arbitration agreement, but the arbitration agreement is illegal and has become ineffective, therefore, the matter is not referable to the arbitrator and, therefore, the plaintiff is filing the suit for recovery of the certain amount against the defendants. The defendant submitted an application under Section 8(1) of the Arbitration and Conciliation Act, 1996. In reply, plaintiff raised the objection that arbitration agreement has not been filed by the defendants alongwith the application but it appears from the entire order that despite raising this objection for the reasons best known to the defendants, they did not raise this objection before the trial court during the course of arguments and obvious reason may be that the plaintiff must have noticed that he may not succeed on this objection as plaintiff himself has admitted the contract between the parties to the suit though he has challenged the validity of arbitration agreement and, therefore, the trial court had no occasion to decide this issue. The Section 8 of the Act of 1999 is relevant to be quote here, which reads as under: -

> **8.Power to refer parties to arbitration where there is an arbitration agreement.-**(1) A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration-

> (2) The application referred in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.
>
> (3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made. "

The language used in sub-section (2) of Section 8 of the Act of 1996 clearly discloses that it is statutory requirement that when application under Section 8 of the Act of 1996 is filed, the application should accompany by the original arbitration agreement or duly certified copy thereof. This is the procedure provided for entertaining the application under Section 8 of the Act of 1996. The sub-sections (1) to (3) of Section 8 of the Act of1996 nowhere deals with contingencies where the original arbitration agreement is in power and possession of the plaintiff himself or when both the parties agree that there exist arbitration agreement and none of the party can because of any reason can produce the original or certified copy of the arbitration agreement or when both the parties have no doubt about the term of arbitration clause and they understood the terms and conditions of the arbitration clause and they admit in their pleadings or otherwise that there is arbitration agreement between the parties. It is nowhere a case of the plaintiff that plaintiff is not relying upon the contract, which he signed for obtaining the contract. Rather in this case, the plaintiff very specifically admitted that because of the illegality and ineffectiveness

of the arbitration clause no.23 of the contract between the plaintiff and the defendant, the matter is not referable to the arbitrator and, therefore, the plaintiff is filing the suit for recovery of the amount against the defendants. Meaning thereby, existence of contract containing the condition of settlement of dispute through arbitration is a admitted fact. It was the burden upon the plaintiff himself to prove that there are reasons prima facie, to believe that the arbitration clause having no.23 in the contract is prima facie illegal and prima facie ineffective, but the plaintiff failed to prove this fact at the time when the objection of defendants for referring the matter to arbitration in the suit was considered by the court below. The Hon'ble Apex Court in the case of ITC Ltd. (supra) considered the case of W.F. Ducat & Co. Ltd. Vs Hiralal Pannalal reported in AIR 1976 Cal. 126 and referred the observation of that case, which says "In W.F. Ducat & Co. Pvt. Ltd. Vs. Hiralal Pannalal, Salil K. Roy Choudhary, J. held at paragraph 8 that where in a suit the plaintiff alleges that the contract containing the arbitration clause is void and illegal and prima facie it appears that there are sufficient grounds on which the legality of the said contract has been challenged for non-compliance of the statutory requirement, the court should decline to exercise discretion in favour of the stay of the suit." Therefore, in view of the above, here in this case, in fact, the plaintiff himself failed to prove that the arbitration clause contained in the contract is prima facie illegal,void or ineffective.

So far as non-production of the original agreement by the defendants is concerned, no such argument was raised before the court below and as stated above, there may be possibility of plaintiff's come to the senses that original agreement is lying with the plaintiff himself or he cannot succeed on this point. Be that as it may, even assuming for the sake of argument, that plaintiff raised objection about the non-production of the arbitration agreement and in view of sub-section (2) of Section 8 of the Act of 1996 the application can be entertained when it is accompanied by the original arbitration agreement or certified copy of the arbitration agreement even then in peculiar facts of this case where the plaintiff himself not only admitted contract between the parties, but also admitted that there is clause no.23 in the contract providing for arbitration in case there arises any dispute in relation to the contract and plaintiff himself wanted to avoid that condition by saying that that condition is illegal and ineffective, the plaintiff when failed to prove that the arbitration contract is illegal or ineffective then he has no right to object against referring the matter to arbitration.

Not only above, but the plaintiff went ahead and contested the arbitration agreement by submitting that the arbitration clause contains provision for having four arbitrators, which is in even number and that condition is against the Section 10 of the Act of 1996. Meaning thereby, in fact, the entire thrust of argument of plaintiff-petitioner before the

court below was not about the procedure to be adopted for referring the matter to the arbitrator,but was that the arbitration contract is illegal. Thereby, the plaintiff himself pursued the court as well as the defendants to proceed on assumption that contest is not on the procedural aspect of the matter, but on the merit of the arbitration clause itself. The plaintiff thereby permits the court as well as party to entertain the application under sub-section (1) of Section 8 of the Act of 1996 without there being agreement of arbitration annexed with the application itself. Now, in the revision petition, the petitioner cannot be permitted to have such a plea. The aim and object of Arbitration and Conciliation Act, 1996 is not to see how the matters which can be referred to the arbitrator can not be referred to the arbitrator. In this case, the objection raised by the defendants about the validity of the arbitration clause was the argument, which was pressed and decided by the court below against the petitioner-plaintiff.

It is true that Hon'ble Apex Court while dealing with the matters arising under the Arbitration Act, 1940 held that when there is a challenge to the arbitration agreement by the plaintiff himself and their exists sufficient grounds, which are sufficient to prove prima facie that arbitration agreement is void and illegal then it is not necessary to stay the suit proceedings. A radical change has been made by enacting sub-section (1) of Section 8 of the Act of 1996, which says that a judicial

authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration. Under Section 34 of the Act of 1940 a discretion was given to the court to stay the suit proceedings and the aim and object of the Act of 1996 is clear and unambiguous, which says that where there is a clause of arbitration, the disputes are required to be referred to the arbitrator. In view of the above,the court should lien in favour of referring the matter to the arbitrator when there is admitted case of arbitration agreement and further in a case where one of the party challenges the validity of the arbitration agreement,but failed to even prove prima facie illegality in the arbitration agreement. So far as objection of having four arbitrators are concerned, that is also a matter of procedure because both the parties by entering into agreement agrees for settlement of dispute through arbitration proceedings and for that purpose, a procedure they may evolve and in case the procedure is faulty, the procedure as provided under Section 11 of the Act of 1996 can be followed. Sub-section (1) of Section 10 only provides that parties shall be free to determine the number of arbitrators, but the arbitrator shall not be in even number. Therefore, if the appointment of arbitrator goes,the intention of the parties to have the settlement of the dispute through arbitrator is a separable part of the contract and, therefore, procedure under Section

11 of the Act of 1996 if no other agreement is possible can be followed.

Hence, the revision petition of the petitioner is dismissed.

**(Prakash Tatia), J.**

c.p.goyal/-